

SIM KIE CHON

v.

SUPERINTENDENT OF PUDU PRISON & ORS.

SUPREME COURT, IPOH
ABDUL HAMID OMAR CJ (MALAYA)
SYED AGIL BARAKBAH SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 234 OF 1985]
23 JULY 1985

CIVIL PROCEDURE: *Application to strike out statement of claim - Principles applied by Court - Pardons Board - Functions of - Exercise of powers of pardon - Prerogative of executive - Stay of execution of death sentence - Exercisable only by the Yang di-Pertuan Agong.*

The appellant instituted proceedings alleging *inter alia* that the 2nd respondent, the Pardons Board of Malaysia, had failed to consider his petition for mercy properly and that in failing to commute the death sentence imposed on him the Pardons Board had acted unconstitutionally contrary to Article 8 of the Federal Constitution. On an application made by the respondents under O. 18 r. 19 of the Rules of the High Court 1980, the Judge of the High Court ordered the appellant's claim to be struck out and further ordered the dissolution of the order for the stay of execution made earlier. The appellant appealed against the said orders.

Held:

[1] On an application to strike out a statement of claim under O. 18 r. 19 of the Rules of the High Court, the right course for the Court to take is to strike out the claim if it is satisfied that the claim does not disclose a reasonable cause of action.

[2] It is not the function of the Pardons Board to commute a death sentence. Its function is merely to tender advice to the Yang di-Pertuan Agong.

[3] The power to grant a pardon is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review.

[4] Mercy is not the subject of legal rights. It begins where legal rights end.

[5] The power to stay execution of death sentence is only exercisable by the Yang di-Pertuan Agong.

[6] Proceedings in Court aimed at questioning the propriety or otherwise of a decision made pursuant to an exercise of a royal prerogative of mercy are not justiciable.

[Appeal dismissed.]

Cases referred to:

Attorney-General of Duchy of Lancaster v. L. & N.W. Railway Co. [1892] 3 Ch 274
Council of Civil Service Unions and Ors. v. Minister for the Civil Service [1984] 3 All ER 935
Public Prosecutor v. Lim Hiang Seoh [1979] 2 MLJ 170
G. Kista Gowd and Anor. v. State of Andra Pradesh [1975] ILR Andra Pradesh 771 (DB)
Michael de Freitas v. George Ramoutar Benny and Others [1976] AC 23
Chiew Thiam Guan v. Superintendent of Pudu Prison and the Government of Malaysia [1983] 2 MLJ 116; [1983] CLJ (Rep) 92

a Legislation referred to:

Federal Constitution, art. 8, 42, 42(1)
Rules of the High Court 1980, O. 18 r. 19
Essential (Security Cases) (Amendment) Regulations 1975, reg. 29

Other source referred to:

Supreme Court Practice 1985

b

For the appellant - Karam Singh (K. Siva Segara with him); M/s Karam Singh Veriah & Co.
For the respondents - Mohd. Rauff Nabi Box Senior Federal Counsel

[Editor's Note: The High Court decision which resulted in this appeal is reported in [1985] CLJ (Rep) 768

JUDGMENT

c

Abdul Hamid Omar CJ:

This is an appeal against the decision of Harun J given at the High Court, Kuala Lumpur, ordering that the appellant's statement of claim be struck out and the order for a stay of execution be dissolved. There is also a motion for a stay of execution.

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The order to strike out the statement of claim and the dissolution of the order for the stay of execution were made by the learned Judge after hearing an application by the respondents/defendants, on a certificate of urgency, on grounds that:

- (1) the matters raised in the said Writ and the accompanying Statement of Claim are non-justiciable and/or outside the jurisdiction of this Honourable Court;
- (2) the Honourable Court has no jurisdiction to grant a stay of execution on a warrant of execution on a Sentence of Death issued against the plaintiff on 18 May 1985;
- (3) the purported action of the plaintiff is misconceived in that the death sentence pronounced by the High Court and confirmed by the Federal Court is final and conclusive and cannot in any event be reversed.

In his judgment the learned Judge has made a finding that there is no cause of action.

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At the hearing before us the appellant contended that there is disclosed from the statement of claim a triable issue and the learned Judge should not therefore have struck out the statement of claim.

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The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980: "the summary procedure under this Rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'." (*Attorney-General of Duchy of Lancaster v. L. & N.W. Railway Co.* [1892] 3 Ch 274) (Supreme Court Practice 1985).

On an application to strike out the statement of claim and dismiss the action, the right course for the Court is to strike out the claim if it is satisfied that a claim does not disclose a reasonable cause of action.

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In the instant case we are satisfied that the learned Judge was right when he held that there was disclosed no cause of action.

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With respect to the statement of claim before the Court the only paragraph that purports to raise an issue is para. 4. It contains an allegation that the Pardons Board did not consider the petition for mercy properly. The contents of para. 5 and 6 are in the nature of particulars

to support the allegation contained in para. 4. In para. 7 of the statement of claim it is alleged that by the failure to commute the sentence, the Pardons Board has acted unconstitutionally contrary to Article 8 of the Constitution. **a**

It is the appellant's contention that the inequality lies in the fact that while the Board commuted the death sentence of Mokhtar Hashim it did not do the same in respect of the appellant. In our view there is no merit in the contention for it is not the function of the Board to commute a death sentence. Its function is merely to tender advice. **b**

Under Article 42(1) of the Federal Constitution it is provided that:

- (1) The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territory; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State. **c**

In the present case though the Pardons Board tendered advice to the Yang di-Pertuan Agong but clearly the Yang di-Pertuan Agong himself exercised the power in accordance with Article 42(1) above read together with reg. 29 of the Essential (Security Cases) (Amendment) Regulations, 1975. In our view, such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review. (See *Council of Civil Service Unions and others v. Minister for the Civil Service* [1984] 3 All ER 935). Basically it is an executive power of the nature described by Suffian LP delivering the judgment of the Court in *Public Prosecutor v. Lim Hiang Seoh* [1979] 2 MLJ 170. Sitting with 4 other Judges, his Lordship said: **d**

When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognised by its inclusion in Chapter 3 of Part IV of the Constitution, is an executive power-as in *Jamaica, Hinds v. The Queen*. **e**

(See also *G. Kista Gowd and Another v. State of Andhra Pradesh* [1975] ILR Andhra Pradesh 771 (DB)). **f**

We hasten to add that we subscribe to what had been stated in *Michael de Freitas v. George Ramoutar Benny and Others* [1976] AC 239 (*de Freitas* case) to the effect that "Mercy is not the subject of legal rights. It begins where legal rights end."

In our judgment, a sentence of death imposed by a Court of law on a convicted person who has since exhausted his legal remedies will not be carried out only if the Yang di-Pertuan Agong or the Ruler of a State or the Yang di-Pertua Negeri, as the case may be, commutes the death sentence in exercise of the powers under Article 42 of the Federal Constitution. If there is to be a stay of such sentence, the power to stay is only exercisable by the Yang di-Pertuan Agong or the Ruler of a State or the Yang di-Pertua Negeri, as the case may be. **g**

In *Chiew Thiam Guan v. Superintendent of Pudu Prison and the Government of Malaysia* [1983] CLJ (Rep) 92 FC, it was held, with reference to an application for stay of execution pending appeal, that: **h**

Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the *de Freitas* case - 'Mercy is not the subject of legal rights. It begins where legal rights end.' Any stay of execution would be only an extension of the prerogative of mercy, exercisable only by His Majesty the Yang di-Pertuan Agong in accordance with Article 42 of the Constitution. **i**

- a** In the present case the appellant's right ends after his appeal was dismissed by the Supreme Court and the death sentence confirmed. Mercy begins but mercy is not a legal right. In the case of *Chiew Thiam Guan v. Superintendent of Pudu Prison and the Government of Malaysia (supra)*, it was held that a decision made pursuant to an exercise of royal prerogative of mercy cannot be varied or confirmed there being no jurisdiction to do so. In our judgment proceedings in Court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable. By the same token a contention of any violation of the fundamental right which rests wholly on or dependent upon such an allegation is also not justiciable. It is our considered view that the power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong or the Ruler of a State or the Yang di-Pertua Negeri, as the case may be, who acts with the greatest conscience and care and without fear of influence from any quarter. (See *Hanratty and Another v. Lord Butler of Saffron Walden* *The Solicitors' Journal* Vol. 115-1971 p.386).
- b**
- c** In view of the foregoing, we see no justification to interfere with the learned Judge's decision. Accordingly, the appeal is dismissed. Both the order to strike off the statement of claim and to dissolve the order for stay of execution are confirmed.
- In the light of our decision, the motion for stay of execution is dismissed.
- d** The deposit of RM500 paid into Court by the appellant shall be paid out to the respondents as costs.

Also found at [1985] 2 CLJ 449

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